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ABSTRACT

Several variants of the "melting pot" ideology have informed the actions of those responsible for educational policy-making in the United States. This ideology has increasingly come under attack by a variety of persons. The purpose of this paper is to outline several legal grounds on which this ideology has been and will be challenged and to spell out some of the implications of successful challenges. The "melting pot" ideology provided some of the impetus in all the states (except Mississippi). Finding in it the state's interest to both compel children to attend school and prevent them from working. At the same time, through the exercise of its policy powers, each of the states has developed a system for selecting and licensing those entrusted with the education of the state's young. There arises out of these interrelated state actions a complex web of issues. In other instances, the state has sought at least in theory to protect the public interest through occupational and professional licensing. But in virtually no other situation besides education is an individual compelled to use the services of one or more specific licensed practitioners. One would consequently expect that the process for designating and licensing of teachers would be extremely rigorous. (Author/JM)

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Several Legal Issues Challenge Traditional 'Melting-Pot' Idea for Educational Policy

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In order to provide a backdrop to my discussion of some of the ways legal developments may impact on the future of education, I wish to provide some exemplary statements of the ideologies that have motivated our thinking about education. The first exemplary statement appears in a work written in 1932 and entitled *Rural Sociology: The Farm Family Institution* (by Roy H. Holmes); while this statement does not bear directly on education, its educational implications are fairly obvious:

> Backward communities and groups, rural and urban, need not be made more happy; they need rather, for the sake of progress, to be freed from their backward condition. In an ideal society, there would be no backward communities. The condition of backwardness consists essentially in narrowness of outlook due to a limited range of suggestions, brought about, in turn, by a high degree of isolation from the general current of human thought. A legitimate and constructive aim of social reform is to break through such walls of isolation, wherever they may be found, carrying to those within as large a fund of ideas as may be made available. This will not in general increase happiness, but it will bring an increase in richness of human experience. . . . From the standpoint of the larger society, the freeing of backward groups from their backwardness results in an increase of efficiency through bringing more individuals into effective service of the whole. From the standpoint of the individual who experiences this change, it means a more abundant life, which he may or may not think of as involving a net increase of happiness.

The second exemplary statement is explicitly about education and provided by Alan Cartter (in "University Teaching and Excellence," an essay in *Improving College Teaching*):

> As higher education continues to expand, a large proportion of the students who come to us are without the family and community background which would provide them with intellectual curiosity and a strong moral sense. We are expected to give them a purpose to live for and standards to live by, to encourage those attributes of being which are associated with the cultured gentleman. . . .

The final entry of exemplary statements occurs in a 1936 court opinion (*Byrd v. Begley*, 90 S.W. 2nd. 371-1936):

> . . . we are self-governing people, and an education prepares the boys and girls for the duties and obligations of citizenship. Neither the schools nor the state can carry on without rules or laws regulating the conduct of the student or citizen, and those who are taught obedience to the rules and regulations of the school will be less apt to violate the laws of the state.

The educational ideologies expressed in these three statements have informed the actions of those responsible for educational policy-making in the United States. Generically, these ideologies might be regarded as variants of the "melting pot" ideology that has increasingly come under attack by a variety of persons. My purpose here is to outline several legal grounds on which this ideology has been and will be challenged and to spell out some of the implications of successful challenges.

Certainly the "melting pot" ideology provided some of the impetus in all the states (except Mississippi), finding in it the state's interest to both compel children to attend school and prevent them from working. At the same time, through the exercise of its police powers, each of the states has developed a system for selecting and licensing those entrusted with the education of the state's young. There arises out of these interrelated state actions, a complex web of issues. In other instances, the state has sought at least in theory to

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protect the public interest through occupational and professional licensing. But in no other situation besides education, other than legal declaration of insanity or commission of a crime, is an individual compelled to use the services of one or more specific licensed practitioners. Short of extraordinary circumstances or an unprecedented and successful *habeas corpus* action, every child must attend school. One would consequently expect that the process for designating and licensing of teachers would be extremely rigorous. Not only is protection of the public interest at stake. There is also at stake a state interest so powerful and necessary as to justify compelling an individual to use the services of a particular practitioner or group of practitioners.

Certification Must Protect Public Interest

The state's exercise of its police power in licensing teachers is "legitimate, moral, and rational, only to the extent that teacher certification protects and promotes some demonstrably legitimate public interest of the people for whose welfare and benefit state accredited schools are established," according to results of legal research being done by the Study Commission's East Coast Network ("Basic Legal Issues in New York State on Teacher Certification," unpublished paper). More specifically, one would expect that in protecting and promoting that interest, the licensing of teachers would be based on demonstrated competency, both general competency and competency to assist in the intellectual, emotional, and/or vocational growth and development of a child in a specific neighborhood and culture; one would not expect that the state would seek to protect its interest by relying on mere completion of an approved program of training. Given the overriding interest of the state in educating its citizens, one would expect, in short, that the licensing of those undertaking that task would display the character of the state's interest. Minimally, one would expect the following:

> (1) That there would exist rather detailed descriptions of what the job of teaching constitutes, not highly generalized descriptions, but institutionally and job specific descriptions.
>
> (2) That the assessment of candidates for licensing would be conducted in terms of such job descriptions.
>
> (3) That the assessment of educational personnel would be recurrent and conducted in terms of the original, or evolving, job descriptions.

As we all know, this is not universally nor even typically the case. The author is aware of no instances in which a school system has prepared adequate job descriptions. At best present teacher licensing procedures can claim something approaching content validity, the sort of validity resulting from *subjective* comparison between prior education and experience (and in some instances test results) and a specific job, the nature of which, as I have indicated, is either generally unknown or largely unde-

It is in this context that Title VII of the Civil Rights Act of 1964 and its subsequent amendment become important and provide one of the bases for challenging the "melting pot" ideology that has motivated our general educational policies, including teacher credentialling. Title VII originally offered protection to several groups from various forms of discriminatory employment practices in private enterprise, and, then, by amendment, provided the same protections from discriminatory practices of state and local governmental agencies, including schools and colleges. As the result of litigation to seek enforcement of Title VII, the Supreme Court in *Griggs v. Duke Power Company* (401 U.S.421-1971) held that procedures in assessing prospective employees or present employees for promotion must be *neutral* with respect to factors such as test scores and educational background, *except* when the results of tests or educational background have a manifest relationship to performance on the job.

Case Cites Equal Employment Guidelines

The Equal Employment Opportunity Commission's Guidelines for Employee Selection, cited approvingly by the court in *Griggs*, provide three ways of validating selection criteria: content, construct, and predictive validation. Essentially content validation involves the demonstration of a "rational" relationship between the criteria—as in the content of a test or an educational program—and the job. Construct validation proceeds in similar fashion in that a rational relationship is sought between personal attributes and the requirements of job. Predictive validation, the most preferred of the three forms of validation, involves demonstrating that the on-the-job performance of groups selected according to stated criteria is superior to that of randomly selected groups.

When one begins to look at the profession of teaching, at whatever level, it is almost immediately apparent that present employee selection procedures in educational institutions are likely to be suspect. The response of the American Council on Education is suggestive; its Task Force on Equal Employment in its recent mailing to constituent members indicates that it is preparing documentation intended for its members' use to show that the Ph.D. is a *bona fide* employment criteria.

Recent and current Title VII litigation with respect to teacher licensing and employment practices has arisen against specific school boards and particularly against the use of allegedly non-job-related tests. It is important, however, to realize that the Equal Employment Opportunities Commission and the Supreme Court have so interpreted the legislative intent of Title VII as to include more than use of unvalidated tests. Sheila Huff, in an important but uncirculated paper on the educational implications of Title VII, notes that *"specific educational requirements* are also included in the [EEOC] definition of the term 'test'" ("The New Realism in Employment Practices," Educational Policy Research Center, Syracuse University).

The Supreme Court in *Griggs* is even more explicit:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed

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measures of capability . . . diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The application of this principle in the case *Buckner v. Goodyear* (339F. Supp. 1108, 1972) led the court to find that some required courses in an apprenticeship program were not job-related:

> The Company has failed to persuade the court that English composition and Principles of Economics are sufficiently related to the performance of various craft jobs to require their successful completion. . . . Even with such corrections [deletion of the requirements] . . . it is not clear that . . . the other academic courses are necessary to the training of potential craftsmen. Helpful and desirable, yes; necessary, perhaps not. (Any attempt to construe the meaning of this passage should, however, heed footnote 19 in the opinion.)

And though recent litigation has named only individual employers as defendants, Benjamin Shimberg and his colleagues in *Occupational Licensing: Practices and Policies* anticipate that "the social and legal pressures that have heretofore been placed on private employers to use fair employment practices may now be expected to be exerted with equal or greater force on licensing boards and other public agencies." Though the courts are likely to take the position that the EEOC guidelines "must not be interpreted or applied so rigidly as to cease functioning as a guide and become an absolute mandate or prescription," it is equally clear that overreliance on a minimal sort of content or construct validity in licensing and employing of teachers will be challenged –successfully I think. (See *U.S. v. Georgia Power Company,* cited in Sheila Huff's paper mentioned above.)

Licensing, Hiring, Promotion Being Reshaped

What this suggests, then, is that the licensing, hiring, and promotion of educational personnel will be considerably reshaped, either voluntarily or under court order. There are, of course, several efforts to create new sorts of programs preparing educational personnel and new ways of assessing candidates for licensure. Generally, these are known as "competency" or "performance"-based systems. These systems, however, may not be the adequate solution that some of their advocates claim. William O. Robinson's commentary on the paper, "The Power of Competency -Based Teacher Education," produced by the Committee on National Priorities in Education, is instructive ("The Power of Competency-Based Teacher Education: Views of a Civil Rights Lawyer," unpublished paper). He argues that the preferred and rigorous criterion-referenced or predictive validation of teacher education and licensing requires establishing validity not only in terms of the *effects* of a teacher education *program* on the competencies of a *prospective teacher* but in terms of the effects of the teacher prepared on student achievement and well being. Robinson proposes a two-prong test of the validity of teacher licensing practices: (1) the general competence of the candidate in some field or area and (2) the effect of the teacher on the student. The latter test is of particular interest since what it requires is development of a principle which I will label "a principle of benign effect."

In formulating such a principle I would like to begin by calling attention to a policy statement adopted by the Executive Committee of the Conference on College Composition and Communication in the Spring of 1972:

> We affirm the student's right to his own language—the dialect of his nurture in which he finds his identity and style. Any claim that only one dialect is acceptable should be viewed as an attempt of one social group to exert its dominance over another, not as either true or sound advice to speakers and writers, nor as moral advice to human beings. A nation which is proud of its diverse heritage and of its cultural and racial variety ought to preserve its heritage of dialects. We affirm strongly the need for teachers to have such training as will enable them to support this goal of diversity and this right of the student to his own language.

This statement may serve to initiate our consideration of what a "principle of benign effect" might look like, particularly since it implicitly formulates a principle of *neutrality* with respect to language. The statement calls upon teachers, administrators, and others not to deny to students their language nor to disparage the language or dialect of any student.

Chinese Students Ask for Extra Instruction

In this context, the recent Supreme Court decision in *Lau v. Nicholas* is helpful (No. 72-6520, opinion delivered Jan. 21, 1974). In this case, the petitioners, who were representative of 1800 other non-English-speaking Chinese in San Francisco, sought to require the State of California and the San Francisco Unified School District to provide instruction permitting them to comprehend and benefit from classes taught exclusively in the English language. The lower court had held that "these Chinese-speaking students–by receiving the same education made available upon the same terms and conditions to the other tens of thousands of students in . . . the District–are legally receiving all their rights to an education and to equal educational opportunities." Though it avoided constitutional questions, the Supreme Court overruled the lower court and held that the state and the San Francisco schools must provide the kind of instruction sought by the petitioners.

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This decision appears to substantially increase the significance of an earlier Texas district court memorandum opinion. In the aftermath of a decision forcing desegregation of the San Felipe Del Rio Consolidated Independent School District in Texas, Judge William Wayne Justice provided a memorandum clarifying the earlier court order. Justice acknowledged being particularly impressed by the testimony of Jose Cardenas regarding "cultural incompatibilities" which prevent Mexican-American students from generally being able to "benefit from an educational program designed primarily to meet the needs of so-called Anglo-Americans." Subsequently, Justice wrote: that "under the circumstances here . . little could be more clear to the court than the need . . . for special educational consideration to be given to the Mexican-American students in assisting them in adjusting to those parts of their new school environment which present a cultural and linguistic shock. Equally clear, however, is the need to avoid creation of a stigma of inferiority as to 'the badges and indicia of slavery' spoken of in *United States v. Jefferson County Board of Education.* To avoid this result, the Anglo-American students too must be called upon to learn to adjust to their different linguistic and cultural attributes" (*U.S. v. State of Texas,* U.S. District Court for Eastern Division of Texas, Tyler Division, Civil Action No. 5281).

Both the decision in *Lau* and the Texas opinion have immediate, and I think, clear, consequences for the certification and employment of teachers. The consequences are that these findings together with the application of the EEOC guidelines (and a modicum of reason) require that in the schools attended by these students whose linguistic and cultural attributes are not those of the dominant cultures, the teachers have to be fluent in the relevant non-English language(s), and probably should be bearers of the students' culture. I cannot conceive how a teacher can have a benign effect on a student's achievement and well-being if he or she does not speak the only language possessed by the child. The significance of these cases and of their implications for the licensing and employment of educational personnel is not limited to Texas or San Francisco. In 1968, it was estimated that some three million children were speaking non-English languages as their native tongue, that 75 to 80 per cent of all black children of school age command a southern rural or northern urban dialect of English, and that approximately six million American children "are taught by people who 'do not know their language'" (*The Education Professions 1968,* U.S. Dept. of HEW, Office of Education).

'Learning-By-Doing' Ideal for Amish

But languages and dialects do not exist in vacuums. Attached to language and dialect are other cultural patterns—cognitive, affective, gestural, kinesic, and social. The question we must ask is whether our schools can continue to pursue a melting pot ideology and simultaneously enable teachers and other educational personnel to benignly affect students. In one case the Supreme Court has apparently ruled that the schools cannot. I refer to the momentous decision in *Wisconsin v. Yoder* (406 U.S. 205). In this case, the court exempted Amish children from Wisconsin's state law compelling attendance at school after completion of the eighth grade. The decision was grounded rather wly—and I emphasize this--on the "free exercise" clause of the First Amendment. What is intriguing for our purposes, however, is that the court found it necessary to balance state interest and individual rights and in doing so found the testimony of Donald A. Erickson persuasive:

> [He] . . . testified that the system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community. . . . As he put it, "these people aren't purporting to be learned people, and it seems to me that the self-sufficiency of the community is the best evidence I can point to. . . ."

Subsequently, the court writes:

> **Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable, and highly sufficient community for more than 200 years. In itself, this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.**

In this balancing of individual and community interest against that of the state, the court in effect recognizes an old distinction in the history of law, a distinction between customary law (consuetudines) and official law (leges). [On the history of the distinction between custom and law, see Paul Vinogradoff, *Custom and Right* (Oslo, 1925), particularly Chapter II.] That is, the court in this instance recognizes the primacy of the custom of the place over official law, since the state failed to show a rational and substantial interest.

This case adumbrates the possibility of litigation on the basis not only of the First Amendment, but on a number of other legal bases in attempts to secure recognition of customary over official law—recognition of one's right to his language and culture.

The recognition of custom (consuetudines) is not without precedent in the history of American legal action, even with respect to schools. I call your attention to the Treaty of Guadalupe Hidalgo effected between the United States and Mexico in 1848 (*El Tratado de Guadalupe Hidalgo, 1848,* Telefact Foundation in Cooperation with the California State Department of Education, 1968, p. 108). In the original version of Article IX of the treaty, "all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry," will be protected from interference by the American government. The guarantee extends to "all temples, houses and edifices dedicated to the Roman Catholic worship as well as property destined to its support, or to that of schools, hospitals, and other foundations for charitable and beneficient purpose."

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This guarantee is a companion to a provision providing that the Mexicans, so electing, shall be incorporated "into the Union of the United States and be admitted . . . to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution."

'Religious and Customary' Institutions Protected

Though the United States by amendment substituted a new text, a protocol indicates that the new text is to be so construed as to include "all the privileges and guarantees, civil, political and religious, which would have been possessed by the inhabitants of the ceded territory if [the original text] had been retained." While this article does not guarantee a right to bilingualism in government or in education, it does entail two things: (1) it guarantees the neutral incorporation of Mexicans, so electing, into the body politic of the United States; by neutral incorporation I mean, incorporation without respect to language, traditions, or customs; and (2) in its provision regarding institutions of religion, it guarantees protection to the institutions supporting the religious and customary life of the people. Recognition of the differences in custom and traditions, as well as in language, repeatedly occurs in the controversies surrounding the granting of statehood to Arizona and New Mexico; one document of the period reads as follows:

> . . . the people of New Mexico . . . are not only different in race and largely in language, but have entirely different customs, laws, and ideals, and would have but little prospect of successful amalgamation. ["Protest Against Union of Arizona with New Mexico" in U.S. Senate Document 216, 59th. Congress, 1st Session, February 12, 1906; quoted from *The Excluded Student: Educational Practices Affecting Mexican-Americans in the Southwest, Report III* (U.S. Commission on Civil Rights, May, 1972), p. 77. See pp. 76ff for a "legal and historical backdrop." The authors of this report assert that "the treaty also guaranteed certain civil, political, and religious rights to the Spanish-speaking colonists and *attempted to protect their culture and language*" (p. 76).]

This, as an instance of issues arising out of the statehood controversy, suggests that the treaty, while not explicitly guaranteeing perpetuation and protection of Mexican language, customs and culture, took cognizance of the attributes of the people being incorporated into the United States.

It appears debatable whether the Treaty of Guadalupe Hidalgo guarantees protection of the Mexican-American's right to his language, culture, and customs. The Ninth Amendment to the federal Constitution, however, appears to provide substantial grounds for claiming such a right—grounds available to all U.S. citizens. This amendment provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The meaning of this amendment has not been clearly established. We are somewhat at sea without the anchor of precedents, though that may not be all bad, given the history of the construction of the Fourteenth Amendment. [The invocation of the Ninth Amendment to protect one's right to his own language is suggested by Edwin F. Klotz in his essay, "The Honest and the Glorious," in *El Tratado de Guadalupe Hidalgo. 1848*, p. 24. Anthony Garvin, in "Educational Policy Implications of a Legal Theory of Public vs. Private Benefits" (Discussion Draft) Educational Policy Research Center, Syracuse, N.Y., October, 1972, p. 16, notes that "the discovery of the Ninth Amendment by legal theorists could have an enormous impact on educational policy."] There appear to be essentially two ways of understanding this amendment. Without rehearsing the technical aspects of either, they can be summarized as follows.

> (1) The first method of construing the Ninth Amendment is in essence to regard the amendment as methodological in intent; it assumes that the first eight amendments are to be interpreted not as enumerating discrete and separate rights, but as constituting in themselves the source of law and to be interpreted so as to control and determine historically novel legal problems (See Mitchell Franklin, "The Ninth Amendment as a Civil Law Method and Implications for Republican Form of Government," 40 *Tulane Law Review* 487, 1966).
>
> (2) The amendment can be taken as securing the fundamental and inherent rights of persons that are neither enumerated in the Constitution nor ceded to the federal government, or, with the addition of the Fourteenth Amendment, to the states. Further, one commentator has urged that the Ninth Amendment was intended to protect the unenumerated rights, not only as they have now appeared, but also as such rights may appear as history and the future unfold: "As the race becomes more evolved, and as the respect for the dignity of human life increases; as we become more intelligent and spiritual beings, then we shall learn more of the fundamental truths of human nature" (See Bennett Patterson, *The Forgotten Ninth Amendment*, Indianapolis, 1955).

While these methodological considerations are of great import and significance, it appears sufficient for now to note that both can be used to construct arguments securing for the individual a right to his own language (including here not only its verbal components but the associated kinesic and gestural systems) and to his own culture, except, one might add, in instances in which the state can demonstrate an overriding and compelling interest. Interpreted with the second method of interpretation, the Ninth Amendment recognizes the superiority of custom over official law, in some instances. Thus, in his opinion in *Griswold v. Connecticut* (381 U.S. 479 at 493), Justice Goldberg interprets the Ninth Amendment so as to find protection of the general right of privacy, and particularly the privacy of marital intercourse. The sources of this right, according to the judge, are two: "the tradi-

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tions and [collective] conscience" of the people and a theory of "fundamental personal rights":

> In determining which rights are fundamental, judges are not left at large to decide cases in the light of personal and private notions. Rather they must look to the "traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental." . . . "Liberty also gains content from the emanations . . . of specific guarantees" and "from experience with the requirements of a free society."

Customs and Mores of Community Recognized

The significance of this interpretation of the Ninth Amendment lies in the recognition of the legal force of customs and traditions. Further, in a widely publicized and commented-upon decision regarding obscenity, one of the tests is whether the material under consideration is obscene when "community standards" are applied; finding that a national standard is "hypothetical and unascertainable," the court resorts to recognition of the customs and mores of the community (*Miller v. California*, 93 Sup.Ct. 2607). Thus, what is obscene in Sioux City may or may not be obscene in San Francisco, may or may not be obscene in Burlington, Vermont.

The line of argument I have incompletely developed supports an assertion of an individual's right to his culture. If a court can write that "the law should be construed in reference to the habits of business prevalent in the country at the time it was enacted" and that "the law was not made to create or shape the habits of business but to regulate them, as then known to exist" (Patterson, p. 56), certainly, with respect to language and culture, education laws must be so construed as to protect the linguistic and cultural habits of individuals and groups.

Thus, in the absence of a compelling state interest, the character of which I cannot imagine, the state must be *neutral* with respect to language and culture. Any other position requires development of arguments demonstrating the state's interest in depriving an individual (or a collection of individuals) of his most private habits, customs, and mores, an interest that could hardly be said to secure "benign effect." The concept of neutrality is not foreign to our traditions or judicial opinions. The implications of the "wholesome neutrality" of which the Court spoke in *Abington School District v. Schempp* (374 U.S. 203) are perhaps helpfully clarified in the following passage from Justice Clark's opinion:

> . . . it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. *Nothing we have said here indicates that such study of the Bible or of religions when presented objectively as part of a secular program of education may not be effected consistent with the First Amendment.*

State Must Remain 'Neutral'

Here the court requires that the state be neutral with respect to one of the significant features of culture—religion; the state can neither promote nor disparage a particular religion. Applied to the language and cultural policy of the state, at least in its educational system, the principle enunciated here would go as follows: There is nothing to *prevent* the teaching of dialects, languages, or cultures other than those possessed by the student so long as they are presented *objectively* as instruments or understandings useful, and perhaps necessary, in social and political intercourse. The corollary to this principle is that no person can be differentially incorporated into the school's activities (or society in general) on the basis of "non-preferred" linguistic or cultural attributes; that is, his language or culture cannot be denied him nor disparaged, nor can he be denied benefits because of either. The implication of this argument for the licensing and certification of teachers is that it must be *neutral* with respect to language and culture, just as it is presently neutral with respect to religion.

But obviously, a requirement of neutrality cannot be imposed on a specific school in a particular community; schooling is in its essence a cultural activity. This observation, however, need not undermine an argument for "cultural neutrality" at the state level. Here the obscenity case referred to above is helpful. In that case, you will recall, the court invoked community standards to test whether materials are obscene. This suggests that variation in cultural patterns, including language and other customs, can be responded to at the local level. Or put another way: just as a national standard for obscenity is "hypothetical and unascertainable," so a national or state standard for the conduct and content of education is hypothetical and unascertainable. Our historic and illusory search for the universal master teacher and curriculum ought to be sufficient evidence to support such an observation. At the local level, as opposed to the state level, it is permissive, indeed obligatory, I am arguing, that the schools be responsive to the personhood of the student and to community standards—its traditions, collective conscience, mores, and habits. Indeed without being responsive to the latter, education, in any meaningful sense, may well be impossible.

Murray Wax assists in clarifying what I am talking about when he speaks of his experiences on the Pine Ridge (in "How Should Schools Be Held Accountable," *Education for 1984 and After*, Study Commission, Lincoln, Nebraska, 1971, pp. 63-64):

> In these classrooms [of Indian children] what I and other observers have repeatedly discovered is that the children simply organize themselves so that effective control of the classroom passes in a subtle fashion into their hands . . . [If the observer of such classrooms] knows what to look for, he will perceive that the reticence of the Indian children has nothing to do with personal shyness and everything to do with the relationship between the child and his peers in that classroom. For [they] exert on each other a quiet but powerful pressure so that no one of them is willing to collaborate with the teacher. . . . What the children primarily resist is the authority of the teacher and his (or her) intervention into their collective lives.

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In the situation Wax describes, education cannot be properly said to be going on. Rather this situation suggests that to create the conditions necessary for what can properly be called "education," it is necessary to attend to the character of the indigenous collective life of these children, the notions of authority and social organization that they bring with them into the educational context. Further, there is an emerging body of research suggesting that learning is at least facilitated, and perhaps made possible, when the didactic modes of the educational institution are consonant with the didactic modes employed in settings other than those of formal education. [See Peggy R. Sanday, "Cultural and Structural Pluralism in the U.S.," unpublished position paper prepared for the Committee on Cultural Pluralism of the Study Commission on Undergraduate Education and the Education of Teachers.] That is, Wax's observations and other research suggest that the educational personnel and the organization of the educational enterprise must, in order to be effective and to benignly affect students, be consonant, or consistent, with the cultural patterns or milieu of the community in which the students live.

Implications for Licensing Numerous

The implications of this argument for the education of educational personnel licensing, and, more generally, the conduct of state supported education, appear to be numerous and profound. Here I will confine myself to the preparation and licensing of educational personnel. Under the conditions established in my argument, an adequate licensing system would almost of necessity be comprised of two tiers. [Two-tier or two-step licensing systems of a somewhat different sort have been proposed by others. See Public Education Association of New York City, "Memorandum Regarding Reform of Personnel Selection Procedures for New York City Public School System By Establishment of a New Two-Step Performance Based Certification System" (memorandum prepared at the request of the New York State Assembly Education Committee, Constance Cook, Chmn., September 15, 1973); and see Metropolitan Research Center, *A Possible Reality of High Academic Achievement for the Students of Public Elementary and Junior High Schools of Washington, D.C.* (1970). reprinted in Committee Print, Select Committee on Equal Educational Opportunity, U.S. Senate, 91st Congress, 2nd Session, September, 1970.]

(1) The first tier would be licensing a person to teach on the basis of demonstrated competence in an intellectual, cultural, or vocational area. This permission on the part of the state would enable an individual to teach something of conceivable worth and value to someone or some group, with the notions of worth and value broadly interpreted.

(2) The second tier would certify that a person has demonstrated competence in teaching children in a specific kind of neighborhood or community. Put another way, the person would be certified as having the capacity to benignly affect the achievement and well-being of children in that neighborhood.

The crucial principle at the second tier is that of "benign influence or effect." Benign influence or effect includes the enhancement of the individual student's competence–physical, intellectual, psychological, and vocational–and indirectly the decency and humaneness of the community. This interpretation of "benign influence" is consistent with the court's considerations in *Wisconsin v. Yoder* in which it relied heavily on the self-sufficient character of the Amish community.

Now we can turn to the question of how educational personnel might be prepared. But not directly, for it takes no perceptive observer to discover that in the United States there are few communities comparable to the Amish community–few communities so cohesive, so self-sufficient, so decent and humane *in its own terms.* Indeed, most communities presently appear to be characterized by various sorts of alienation, by troubling and disrupting discontinuities and incompatibilities between and among significant segments of their primary activities–between and among work, education, and the expressive and imaginative life. Thus, the character of educating educational personnel has to be such that it enables them to assist in a community-building process, a process that may well have to be undertaken *in order to secure benign effect on the achievement and well-being of the student.*

The foregoing considerations suggest the need for considerable reconstruction of the education of educational personnel. One possible model for pre-service and in-service education would have the following features:

(1) The second tier of the licensing process I outlined above, and the recurrent licensing and evaluation of teachers, requires a structure I will call an "examining school," a context in which the individual would be evaluated from several perspectives–those of administrators, peers, parents, and community people–for competency to teach in a specific kind of neighborhood or culture.

(2) In order to assist candidates to prepare for this level of certification, programs might be developed– though completion of them would not be mandatory–and perhaps conducted by the "examining school." These programs might well have the following features:

(a) Learning and education that would assist prospective teachers to "anthropologize" the specific community or region in which they are teaching or in which they intend to teach.

(b) Learning and education that would provide tools to assist in responding to and bridging discontinuities among work, education, and the expressive and imaginative life of the community.

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This learning and education would be heavily experiential:

(1) Experience in a range of institutions or sectors of the community other than schools in order to develop understandings of the ways in which these institutions produce "trouble" for one another and the community, or the ways in which they collaborate in the production of actions leading to realization of commonly shared goals and aspirations;

(2) Experience and theoretical assistance in attending to the private and shared mythologies held by members of the community or region regarding work, education and play. This would involve careful work analyzing the rule structures and value postulates implicit in primary community activities in these areas;

(3) Experience and theoretical assistance regarding the role of the imaginative and expressive life of individuals and communities in celebrating the past and constructing a vision of the future, both private and public, a celebration and a vision studied in relationship to work and education, particularly as it provides cognitive structures for interpreting both;

(4) Experience leading to acquisition of skills and tools to deal with discontinuities and alienation, probably in the form of looking at studies of societies and groups that have successfully overcome these sorts of difficulties and of experience in contexts in which discontinuities and alienation exist, with assistance to address them.

I propose such a model of preparatory and in-service programs since the features of it appear essential to developing an adequate sense or understanding of the character of what benign effect on an individual and of a decent and humane community (as opposed to meaningless generalized propositions about it) might look like. I also regard these features as essential to developing the skills and competencies necessary to simultaneously assist in a community-building process and benignly affect individual students.

Could Improve Character of Civic Life

The implications of the argument I have developed hold out a vision of the future and, consequently, of education that runs directly counter to Mr. Holmes' assertion that, *for the sake of progress,* "backward communities need not be made more happy" but "to be freed from their backwardness." Certainly Mr. Cartter's "attributes of being which are associated with the cultured gentleman" are, except in a few and rare instances, clearly irrelevant, if not detrimental and destructive. But I would urge that acting on the implications of the argument I have laid down would promote the well-being and the improvement of the character of our civic life, a theme running through the various education cases. [The efforts of the Special Committee on Youth Education for Citizenship of the American Bar Association should not be overlooked in this connection. This committee, under the direction of Joel Henning, seeks to foster development and implementation of law-related curricula and teaching practices designed to provide students with the intellectual skills and attitudes necessary for responsible and effective citizenship in an American society governed by rule of law.]

I have perhaps been tempted to conclude too soon, for while I have suggested a configuration of legal constraints within which education will have to be conducted in the future, there remains a rather troublesome problem that has its source in *Brown v. Board of Education* and its progeny. The problem is suggested in a recent district court decision in *Hunnicutt v. Burge* (356 F. Supp. 1227, 1973). In this case, 29 white taxpayers in Georgia initiated litigation against the Board of Regents of the University of Georgia, claiming that Fort Valley State, a state supported institution with an exclusively black student body, is academically inferior and inherently and unlawfully unequal. The court found for the plaintiffs and ordered the Board of Regents to "eliminate the design for black students." Further, the court observed that the academic inferiority of Fort Valley State and its substantial production of teachers (who are subsequently licensed by the state) means that students in public schools in the state of Georgia are being denied equal protection under the state's laws governing the licensing of teachers. (For commentary on a similar situation—Black House and Casa de la Raza in the Berkeley Experimental School District—see "Alternative Schools for Minority Students: The Constitution, the Civil Rights Act, and the Berkeley Experiment," 61 *California Law Review* 858, 1973.)

The court here is relying heavily on the principles enunciated in *Brown,* and its application of them appears to invalidate and undermine the observations and arguments presented earlier in this paper (and to contradict other court decisions). The problem emerging here is how to secure "equal educational opportunity" and at the same time achieve the conditions necessary for what might be properly called education or, in other words, make it possible to secure equal opportunity and simultaneously initiate a community-building process and enable teachers to benignly affect students. This problem is of considerable magnitude and cannot be resolved here, but seems to have its source in what is an unworkable notion of "equality." For "equality" as used in this context is used analogously with "equality" in mathematical language.

Current 'Equality' Concept Unworkable

For a variety of reasons such a notion appears inadequate whether one seeks to measure equality in terms of inputs (as in accrediting and certification) or in terms of output (as in standardized testing). And our experience with "remedial" or "compensatory" education suggests that the current concept of "equality" at a practical level is unworkable, if not destructive. It seems to me that instead of employing a mathematical notion of equality, we might well, following the lead of David Hawkins,

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employ instead another mathematical analogy, that of "commensurability." Recognizing that human beings are congenitally incommensurable—never indistinguishable or identical—Hawkins argues:

> The postulate of incommensurability . . . takes children as congenitally varied rather than "unequal," and raises questions about the *differential* effect of earlier environment in relation to the kinds of learning it has supported or inhibited. It underlines the importance of local and dependent curricular and instructional choices, to make the curricular spiral tangent at many points to the individual lives of children, to the educative resources of *their* total environment which *they* know or can be helped to discover. . . . This proposition is no less important for the education of "advantaged" children; it is only at present less in the political focus ["Human Nature and the Scope of Education" in *Philosophical Redirection of Educational Research*, 71st Yearbook of the National Society of the Study of Education (Chicago, 1972), pp. 301-303].

Hawkins continues,

> But the meaning of incommensurability is that diverse children *can* attain to a common culture—a common world of meanings and skills, of intellectual tools, moral commitments, and aesthetic involvements. Individual development *can* complement individual differences, but only through a matching diversity of learning styles and strategies. Children can learn equally, in general, only as they learn differently. The more constraints there are toward single-track preprogrammed instruction, the more predictably will the many dimensions of individual variety—congenitally and individually evolved—express themselves as a large rank-order variance in learning.

He concludes his exploration of the notion of incommensurability in the following way:

> Human beings are valued within a community for their useful differences . . .—as sources or resources of skill, of aesthetic expression, or moral or intellectual authority. It is not difference as such which we value, but individuality—the unique personal style and synthesis which interests us in each other as subjects of scrutiny, of testing, of emulation, or repudiation. Recognition of individuality completes what I mean by the postulate of incommensurability. The character which members of our own species possess—what we term individuality—implies neither dominance nor identity, but equivalence within a domain of relations sustained by individual diversity. If the old word *equality* should be used in this sense, it is the equality of craftsmen working at different tasks and with different skills, but with plans and tools congruent enough to provide endless analogies and endless diversions. Or, it is the equality of authors who read other authors' books but must each, in the end, write his own.

"Equal opportunity" in light of the postulate of incommensurability requires providing a wide range of diversity in that opportunity. Thus, judgment concerning "equality" among institutions and the competency of individual teachers can be formulated against no mere hypothetical and unascertainable national or statewide standard of "equality" of inputs or outputs. Such formulations must, rather, be formulated against the prerequisites for the sufficiency of the individual and decent and humane communities.